Ooi Siew Eng @ Ooi Siw Eng (F) & Ors v Link Ventures Sdn Bhd (in liquidation) and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(NCVC)(W)-811–04 OF 2017 AND B-02(NCVC)(W)-812–04 OF 2017

HAMID SULTAN, BADARIAH SAHAMID AND MARY LIM JJCA

15 JANUARY 2018

Contract — Specific performance — Sale and purchase agreement — Sale and purchase of property — Two sets of sale and purchase agreements — Whether earlier sale and purchase agreement valid and enforceable — Whether subsequent sale and purchase agreement null and void — Whether High Court should order specific performance of earlier sale and purchase agreement — Whether specific performance appropriate

Link Ventures Sdn Bhd, was the developer of service apartments known as Menara Rajawali ('the project'). At the start, the management of Link Ventures was in the hands of the first, second and third defendants. The son of the third defendant, one Ben Loh Koh Chong was also involved. The development project encountered difficulties and it became an abandoned project. On 25 June 2009, the first and second defendants sold their shares to a company called M-Con Engineering (M) Sdn Bhd who then became the new management and owners of the project. The share sale agreement was completed on 17 August 2011. The new management discovered that during the transition period between the transfer of the shares, the settlement of the purchase price and the transfer of the management of Link Ventures, the old management had sold four of the properties in the project to the appellants in the first appeal ('first set of SPAs'). The purchase price of the first set of SPAs had been substantially paid by the appellants. Subsequently, the four properties were sold to different parties at different dates ('second set of SPAs'). The purchasers of these second set of SPAs were the appellants in the second appeal. Faced with the two sets of SPAs, the new management of Link Ventures decided to sue the appellants in the first appeal. The new management took the position that these sales were illegal and unauthorised and consequently, did not recognise the appellants under the first set of SPAs. On the other hand, the appellants in the first appeal counterclaimed, inter alia, for an order of specific performance. The appellants in the first appeal also initiated third party proceedings against the purchasers of these second set of SPAs ('third parties'), seeking declaratory orders to the effect that their first set of SPAs were valid, enforceable and effective; and that the second set of SPAs were invalid, null and void ab initio. The third parties did not counterclaim or bring Link Ventures as party to these third party proceedings. Link Ventures was then wound up and

a private liquidator was appointed. The private liquidator decided to carry on with the claim. After a full trial, the High Court judge ('HCJ') answered the primary issue on the validity of the SPAs in favour of the appellants in the first appeal. However, the HCJ refused to order specific performance. Insofar as the validity of the second set of SPAs, the HCJ proceeded to find these SPAs invalid. The net effect of the orders made by the HCJ was that the properties remained with Link Ventures. Hence, the appellants and the third parties appealed.

Held, allowing the appellants' appeal:

(1) The HCJ refused the remedy of specific performance on the basis that the appellants in the first appeal had not fully paid the purchase price. Following from a pronouncement that the first set of SPAs were valid, the remedy of specific performance ought to have been granted given that the evidence showed that the appellants remained able, willing and able to complete their part of the SPAs (see para 23).

(2) The decree of specific performance ought to have been granted as the legal prohibitions under s 21(2) of the Specific Relief Act 1950 were not present. The grant of specific performance will not give the appellants any unfair advantage over Link Ventures. Further, the grant will not involve any hardship on Link Ventures which was not foreseen. In fact, this was a non-issue since the liquidator had advised this court that the liquidator wished to proceed with the completion of the SPAs. Therefore, the appeal of the appellants was allowed and the order that the decree of specific performance be granted in respect of the first set of SPAs. The order of the High Court in this respect was set aside and the order of the High Court was varied accordingly. With regard to the second appeal by the third parties, having sold its interests to the appellants, Link Ventures was in no position to sell any beneficial interest to the third parties. The *nemo dat* rule would operate. In the circumstances, the appeal by the third parties was dismissed (see para 24–26).

[Bahasa Malaysia summary

Link Ventures Sdn Bhd, adalah pemaju pangsapuri perkhidmatan yang dikenali sebagai Menara Rajawali ('projek'). Pada permulaannya, pengurusan Link Ventures dipegang oleh defendan pertama, kedua dan ketiga dalam guaman asal. Anak lelaki defendan ketiga, seorang bernama Ben Loh Koh Chong turut terlibat. Projek tersebut menghadapi kesulitan dan terbengkalai. Pada 25 Jun 2009, defendan pertama dan kedua menjual saham-saham mereka kepada syarikat yang dikenali sebagai M-Con Engineering (M) Sdn Bhd yang kemudian menjadi pengurusan dan pemilik baru projek tersebut. Perjanjian penjualan saham diselesaikan pada 17 Ogos 2011. Pengurusan baru mendapati bahawa semasa tempoh peralihan antara pemindahan saham, penyelesaian harga belian dan pemindahan pengurusan Link Ventures, pihak pengurusan

A lama telah menjual empat hartanah dalam projek tersebut kepada perayu-perayu dalam rayuan pertama ('set SPA pertama'). Harga pembelian set SPA pertama dibayar secara penuh oleh perayu-perayu. Seterusnya, empat hartanah tersebut telah dijual kepada pihak yang berlainan dan pada tarikh yang berlainan ('SPA kedua'). Para pembeli SPA kedua ini adalah B perayu-perayu dalam rayuan kedua. Berhadapan dengan dua set perjanjian jual beli, pengurusan baru Link Ventures memutuskan untuk memulakan tindakan guaman terhadap perayu-perayu dalam rayuan pertama. Pengurusan baru mengambil kedudukan bahawa penjualan ini tidak sah dan akibatnya, tidak mengakui perayu-perayu di bawah set SPA pertama. Sebaliknya, C perayu-perayu dalam rayuan pertama menuntut balas, antara lain, untuk satu perintah pelaksanaan spesifik. Perayu-perayu dalam rayuan pertama juga memulakan prosiding pihak ketiga terhadap pembeli-pembeli SPA kedua ('pihak ketiga'), untuk perintah pengisytiharan supaya SPA pertama sah dan boleh dikuatkuasakan; dan bahawa SPA kedua terbatal dan tidak sah ab initio. D Pihak ketiga tidak menuntut balas atau membawa Link Ventures sebagai pihak dalam prosiding pihak ketiga ini. Link Ventures kemudiannya telah digulung dan pelikuidasi dilantik. Pelikuidasi memutuskan untuk meneruskan tuntutan tersebut. Selepas perbicaraan penuh, hakim Mahkamah Tinggi ('HMT') menjawab isu utama mengenai kesahihan SPA berpihak kepada perayu-perayu E dalam rayuan pertama. Walau bagaimanapun, HMT enggan memerintahkan pelaksanaan spesifik. Untuk kesahihan SPA kedua, HMT berpendapat bahawa kedua SPA kedua tidak sah. Kesan dapatan HMT adalah bahawa hartanah tersebut masih kepunyaan Link Ventures. Oleh itu perayu dan pihak ketiga merayu.

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Diputuskan, membenarkan rayuan perayu-perayu:

(1) Hakim Mahkamah Tinggi menolak remedi pelaksanaan spesifik berdasarkan alasan bahawa perayu-perayu dalam rayuan pertama tidak membayar harga belian penuh. Berikutan daripada pernyataan bahawa G set SPA pertama adalah sah, remedi perlaksanaan spesifik sepatutnya diberikan memandangkan keterangan menunjukkan bahawa perayu-perayu tetap mampu, sanggup dan dapat menyelesaikan bahagian SPA mereka (lihat perenggan 23).

H (2) Perintah pelaksanaan spesifik sepatutnya diberikan kerana sekatan di bawah s 21(2) Akta Relif Spesifik 1950 tidak diguna pakai. Pemberian pelaksanaan spesifik tidak akan memberikan kelebihan yang tidak adil kepada perayu-perayu atas Link Ventures. Selanjutnya, pemberian tersebut tidak akan melibatkan apa-apa kesusahan pada Link Ventures I yang tidak diramalkan. Malah, ini bukan isu kerana pelikuidasi telah menasihati mahkamah bahawa pelikuidasi ingin meneruskan penyelesaian SPA. Oleh itu, rayuan perayu-perayu dibenarkan dan perintah pelaksanaan spesifik diberikan berkenaan set SPA pertama. Perintah Mahkamah Tinggi dalam hal ini diketepikan dan perintah

Mahkamah Tinggi diubah dengan sewajarnya.Berhubung dengan rayuan kedua oleh pihak ketiga, setelah menjual kepentingannya kepada perayu-perayu, Link Ventures tidak berhak menjual apa-apa kepentingan yang bermanfaat kepada pihak ketiga. Peraturan *nemo dat* akan beroperasi. Dalam keadaan ini, rayuan oleh pihak ketiga ditolak (lihat perenggan 24–26).]

Notes

For cases on sale and purchase agreement, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7422–7427.

Cases referred to

Bachan Singh v Mahinder Kaur & Ors [1956] 1 MLJ 97 (refd)
Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, FC (distd)
Chua Hee Hung & Ors v QBE Supreme Insurance Bhd [1990] 1 MLJ 480, SC (refd)
Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290; [1984] 1 MLRA 38, FC (refd)
Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116, FC (refd)
Lin Nyuk Chan v Wong Sz Tsin [1964] 1 MLJ 200, FC (refd)
Lysaght v Edwards (1876) 2 Ch D 499, Ch D (refd)
Ong Chat Pang & Anor v Valiappa Chettiar [1971] 1 MLJ 224, FC (refd)
Peninsular Land Development Sdn Bhd v K Ahmad [1970] 1 MLJ 149, FC (refd)
Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633; [1992] 4 MLRH 91, HC (refd)
Tan Ong Ban v Teoh Kim Heng [2016] 3 MLJ 23, FC (distd)
Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45, FC (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966
Land Ordinance (Cap 68) ss 88, 116
National Land Code
Specific Relief Act 1950 ss 11, 11(2), 18, 21, 21(2)

Appeal from: Civil Suit No 22NCVC-82–01 of 2013 (High Court, Shah Alam)

Malik Imtiaz Sarwar (Arthur Wang Ming Way, Hanan bt Mohd Kamal and Sukhdev Kaur with him) (Arthur Wang, Lian & Assoc) in Civil Appeal No B-02(NCVC)(W)-811–04 of 2017 for the appellants.
Ranjit Kaur (Elyna Madeonus with her) (SL Leong, Kartina & Partners) in Civil Appeal No B-02(NCVC)(W)-812–04 of 2017 for the appellants.

Kevin Wong Wye Keong (Ng Dee Ming with him) (Yeap, Yong & Amy) in Civil Appeal No B-02(NCVC)(W)-811–04 of 2017 for the respondent.

Malik Imtiaz Sarwar (Arthur Wang Ming Way, Hanan bt Mohd Kamal and Sukhdev Kaur with him) (Arthur Wang, Lian & Assoc) in Civil Appeal No B-02(NCVC)(W)-812–04 of 2017 for the respondents.

Mary Lim JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals before us which are heard together; both appeals emanate from the same decision of the High Court. The facts are these.

BACKGROUND FACTS

[2] Link Ventures Sdn Bhd, the plaintiff in the High Court, was the developer of a 24 storey, 196 units of service apartments known as 'Menara Rajawali' on land situated in the Mukim of Damansara, Selangor ('the project'). At the start, the management of Link Ventures was in the hands of the first, second and third defendants in the original suit. The son of the third defendant, one Ben Loh Koh Chong was also involved. The development project encountered difficulties and it became an abandoned project.

[3] On 25 June 2009, the first and second defendants sold their shares to a company called M-Con Engineering (M) Sdn Bhd who then became the new management and owners of the project. The share sale agreement was completed on 17 August 2011.

[4] The new management discovered that during the transition period between the transfer of the shares and the settlement of the purchase price and the transfer of the management of Link Ventures, the old management had sold four of the properties in the project to the appellants in the first appeal before us ('first set of SPAs'). The purchase price of the first set of SPAs had been substantially paid by the appellants.

[5] One of the four properties was sold to a purchaser named Pheh Pek Yin under a sale and purchase agreement dated 19 September 2007 but this agreement was terminated on 14 January 2011. This agreement was, however, reinstated on 19 November 2011. On 29 March 2012, Link Ventures also sold another one of the four properties to another purchaser named Lim Lai Lai under a sale and purchase agreement dated 29 March 2012. Yet, even later, on 24 April 2014 and 22 August 2014, two more of the four properties were sold respectively to Tang Chin Kuain & Lee Kooi Ping and Tin @ Tan Pek Han. All these sales will be referred to collectively as the 'second set of SPAs'. The

purchasers of these second set of SPAs are the appellants in the second appeal before us.

[6] Faced with the two sets of SPAs, the new management of Link Ventures decided to sue the appellants in the first appeal. Link Ventures sought declaratory orders to the effect that the first set of SPAs were null and void for various reasons; amongst which was that the appellants knew that there was a change in the management of Link Ventures at the time of sales; that there were no certification by the project architect; and that the monies were paid into unauthorised bank accounts. The new management claimed it was not aware of these sales and that it never received any of the monies paid. The new management took the position that these sales were illegal and unauthorised and consequently, did not recognise the appellants/purchasers under the first set of SPAs.

[7] The suit was filed against the purchasers of the first set of SPAs, with the first three defendants being the former directors and shareholders of Link Ventures and parties who were involved in the first set of SPAs. The first two defendants could not be found while the third defendant was declared a bankrupt. Although the son of the third defendant was alluded to in the statement of claim as having played a substantial role in the negotiation of the first set of SPAs, he was never cited as a party.

[8] In their defence, the appellants under the first set of SPAs insisted that their SPAs were valid and enforceable; that they had dealt with properly authorised representatives of Link Ventures and had no knowledge of the internal management problems of Link Ventures. The appellants counterclaimed for a declaration that the first set of SPAs were valid, enforceable and effective; an order for specific performance and/or an alternative relief for a refund of their monies; and damages.

[9] The appellants also initiated third party proceedings against the second set of purchasers, seeking declaratory orders to the effect that their first set of SPAs were valid, enforceable and effective; and that the second set of SPAs are invalid, null and void ab initio. The third parties did not counterclaim or bring Link Ventures as party to these third party proceedings. In their defence, all the third parties insisted that their SPAs were valid and enforceable and that the first set of SPAs were invalid, null and void ab initio, that they had all fully paid the purchase price of their respective agreements, and that they had been given vacant possession. The third parties further claimed that the first set of SPAs were made with the old management of Link Ventures as asserted in Link Ventures' statement of claim, that such management had no locus or capacity to enter into such agreements, and that it was clear that there were 'suspicious circumstances in the sudden creation of these sale and purchase agreements'.

The third parties did not go beyond these assertions by making a counterclaim or by suing Link Ventures.

[10] On 11 February 2015, Link Ventures was wound up and a private liquidator was appointed. The private liquidator decided to carry on with the claim.

[11] Thus, the central issue at the High Court concerned the validity of the SPAs, whether it be the first set of SPAs or the second set of SPAs. If the first set of SPAs were valid, the next question was the issue of appropriate relief. A second issue arose at the time of submissions as to whether in the event Link Ventures were ordered to refund monies paid, whether such refunds would be made in Link Ventures' capacity as constructive trustee.

DECISION OF THE HIGH COURT

[12] After a full trial, the learned judge answered the primary issue on the validity of the SPAs in the appellants' favour. However, the learned judge refused to order specific performance. According to the learned judge, it was more appropriate to order a refund since the full purchase price had not been paid. The High Court also refrained from ordering such refund on the basis of a constructive trust after finding that such capacity had not been established.

[13] Insofar as the validity of the second set of SPAs entered with the third parties was concerned, following from the earlier findings, the learned judge proceeded to find these SPAs invalid. The net effect of the orders made by the learned judge was that the properties remained with Link Ventures.

[14] Both the appellants and the third parties appealed. The appellants' appeal is in respect of the remedies ordered, the third parties in respect of the issue of validity of the second set of SPAs. The liquidators did not appeal. For ease of reference, the third parties, appellants in the second appeal, shall be referred to as the 'third parties' while the appellants in the first appeal shall remain as the appellants.

OUR DECISION

[15] At the hearing of these appeals, learned counsel for the liquidator advised this court that the properties do not form assets of Link Ventures to be accounted for and to be distributed amongst the creditors. The liquidator takes the position that the sales of the four units must be completed, either to the appellants or to the third parties. The liquidator was content to abide by the decision eventually reached by this court on the two appeals. In other words, the liquidator is not seeking to keep any or all of the four properties, which is

where the learned judge left the parties and the properties concerned.

[16] Following from that, we find ourselves in a somewhat peculiar position on the matter of the validity of the SPAs. On the one hand, the learned judge has pronounced the first set of SPAs to be valid and there is no appeal against this finding; while on the other hand, is the appeal by the third parties that the finding by the learned judge that the second set of SPAs is invalid is erroneous. This position is peculiar because it throws up for consideration an interesting issue of whether both SPAs can be valid.

[17] We begin with the findings of the learned judge on the first set of SPAs. The learned judge found these agreements to be valid. Since there is no appeal by the liquidator on this part of the decision and the liquidator has also told this court that Link Ventures is ready to complete the sales, the only question is to which set of purchasers; we do not find it proper to reopen the decision of the learned judge on this issue. The decision on the matter of validity of the first set of SPAs, stands. This would extend to the second appeal by the third parties as there is no *res* between the third parties and Link Ventures to deal with this issue. Having relied on Link Ventures' claim in this respect and given that the third parties never brought Link Ventures in as a party, the third parties too, must abide by that finding. In any case, the third parties cannot possibly deal with this issue properly in law as they are not parties to those agreements.

[18] With the first set of SPAs settled as being valid and enforceable, we shall proceed to deal with the first appeal and this is in respect of the relief that was ordered. The appellants had sought the principal relief of specific performance but it was denied on the ground that they had not paid the purchase price in full.

[19] With respect, we disagree with the learned judge. The power to grant this discretionary remedy of the decree of specific performance is to be found in ss 11, 18 and 21 of the Specific Relief Act 1950.

[20] First, the exercise of this remedy is a matter of discretion as set out in s 21 of the Specific Relief Act 1950:

> 21 Discretion as to decreeing specific performance
>
> (1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.
>
> (2) The following are cases in which the court may properly exercise a discretion not to decree specific performance:

A (a) where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part; and

(b) where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would
B involve no such hardship on the plaintiff.

[21] The next provision to bear in mind when dealing with land, such as is the case of the four properties here, is s 11(2) which provides that there is a rebuttable presumption that damages is not an adequate remedy:
C

(2) Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

D

[22] When seeking a decree of specific performance, a plaintiff may also claim compensation in addition to or in lieu of specific performance. In the award of such compensation, the court is guided by the principles of justice of the case:

E 18 Power to award compensation in certain cases

(1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.

F (2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

(3) If in any such suit the court decides that specific performance ought to be
G granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

[23] In the present appeal, the learned judge had refused the remedy of
H specific performance on the basis that the appellants in the first appeal had not fully paid the purchase price. With respect, this is not a proper exercise of discretion as it does not accord with the settled and firm principles in this respect. Following from a pronouncement that the 151 set of SPAs is valid, the remedy of specific performance ought to have been granted given that the
I evidence show that the appellants remained able, willing and able to complete their part of the SPAs — see *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290; [1984] 1 MLRA 38; *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633; [1992] 4 MLRH 91. There was no evidence that the appellants were not able to complete their part of the bargain by paying up

the various balance amounts. The appellants have in any event, explained why those amounts are outstanding, the appellants were waiting for instructions from Link Ventures, one of the reasons leading to the learned Judge's conclusion as to why the first set of SPAs is valid.

[24] It is our respectful view that the decree of specific performance ought to have been granted as the legal prohibitions under s 21(2) were not present. The grant of specific performance will not give the appellants any unfair advantage over Link Ventures. Further, the grant will not involve any hardship on Link Ventures which was not foreseen. In fact, this is a non-issue since learned counsel for the liquidator has advised this court that the liquidator wishes to proceed with the completion of the SPAs.

[25] Consequently, we allow the appeal of the appellants and order that the decree of specific performance be granted in respect of the first set of SPAs as prayed for in prayer B of the counterclaim. The grant of this order logically requires the appellants to pay the balance sums due under the first set of SPAs. The order of the High Court in this respect is set aside and the order of the High Court is varied accordingly.

[26] Moving then to the second appeal by the third parties. Having sold its interests to the appellants, we are of the view that Link Ventures was in no position to sell any beneficial interest to the third parties. The *nemo dat* rule will operate.

[27] We also add to this our earlier reasons in that the third parties have chosen to associate themselves with Link Ventures' case on the validity of the 181 sets of SPAs. Since the learned judge has already found those SPAs to be valid, and there is no appeal against that part of the learned judge's decision, it would be highly irregular for this court to express any view on this.

[28] In view of our decision in respect of the first appeal, we do not see it necessary to address the issue of constructive trust. Learned counsel for the appellants has invited this court to consider the application, if any, of two Federal Court decisions, namely *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 and *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23. When we examine those decisions, we will see that they are in any case irrelevant to these appeals.

[29] The facts in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* are these. The case concerned a priority dispute between the chargee bank and a purchaser under an agreement for the sale and purchase agreement. The purchaser had bought a two-storey light industrial building ('disputed property') for RM295,000 and this building was to be erected on one of the

four pieces of land, the subject of the charge. The purchaser paid both booking fee of 5% and a deposit of 10% to account for the purchase price. Subsequent to the SPA, a charge was registered in favour of the finance company to secure repayment of a bridging loan of RM15m granted by the finance company to the chargor developer who needed the loan in order to carry out the development of the proposed industrial development project. The developer defaulted in repayment of the bridging loan which led to the foreclosure of the charge. The disputed property was sold to Karamunsing Jaya Sdn Bhd at RM180,000.

[30] The purchaser sued the developer, finance company, Karamunsing Jaya Sdn Bhd as well as the Assistant Collector of Land Revenue, seeking the following principal declaratory orders:

(a) that as between the purchaser and the developer, the developer was a bare trustee;

(b) that as between the purchaser and the finance company, the charge entered against the disputed property was null and void or invalid because the developer no longer had any chargeable interest or otherwise in or over the disputed property so as to create a valid charge over the same in which case any foreclosure proceedings taken is wrongful as being devoid of any basis; or alternatively, the charge is subject to the purchaser's prior equitable interest over the disputed property since the purchase was prior to the execution and registration of the charge; and

(c) as between the purchaser and the finance company, any foreclosure proceedings resulting in a sale or otherwise is subject to the purchaser's prior equitable interest in which case the payment of RM295,000.

[31] The Supreme Court dealt first with the issue of whether the doctrine of indefeasibility of title or interest in land on registration which is a feature of central importance to the Torrens system of land registration in Peninsula Malaysia under the National Land Code existed under the Sabah Land Ordinance (Cap 68). Upon examining ss 88 and 116, the court concluded that the Ordinance does provide 'for a modified Torrens system of land registration'. The court thereby disagreed with an earlier decision in *Chua Hee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480, preferring an even earlier decision in *Lin Nyuk Chan v Wong Sz Tsin* [1964] 1 MLJ 200. Edgar Joseph Jr, writing for the Supreme Court, opined that s 88 of the Land Ordinance of Sabah 'imply the basic Torrens concept that title to or interest in land vests and divests only upon registration' as that s 88 'emphasises the paramount importance of registration in accordance with Pt V of the Land Ordinance as a condition precedent for the recognition of the validity of title or dealing or claim to or interest in any land (except land still held under native customary tenure without documentary title)'. The Supreme Court took this route

because the court of first instance had examined the issue of priorities in that light. A

[32] According to the Supreme Court, the 'correct approach to adopt in considering the priority dispute in this appeal is to apply general law priority rules, not forgetting s 88 of the Land Ordinance and the concept of bare trust doctrine in a vendor/purchaser situation'. This then brought the court to the position following Jessel MR's dicta in *Lysaght v Edwards* (1876) 2 Ch D 499, that where there is 'a valid contract for sale, the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession'. Mindful that *Lysaght v Edwards* was a case concerning a conveyance under a will and not a dispute between vendor and purchaser, the Supreme Court expressed the view that applying Jessel MR's dicta in unqualified terms 'would be misplaced'. The Supreme Court accepted that it was, however, 'too late now to question the applicability of the concept of the bare trust in a vendor/purchaser situation in Malaysia'; but stressed that the concept will have 'to be applied in a modified form'. B C D E

[33] After examining some earlier decisions of *Peninsular Land Development Sdn Bhd v K Ahmad* [1970] 1 MLJ 149, *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45; *Ong Chat Pang & Anor v Valiappa Chettiar* [1971] 1 MLJ 224 and *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116; and the commentary by Judith Sihombing in her book *National Land Code: A Commentary* (2nd Ed, 1992) (at p 801); the Supreme Court accepted that the concept of the bare trust in a vendor/purchaser situation applies. However, against the Torrens system, that relationship does not arise from the time a contract of sale and purchase of land is concluded. The vendor is a trustee for the purchaser only 'when the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land'. F G H

[34] The Supreme Court was however, not prepared to agree with the proposition expressed by Prof Visu Sinnadurai in 'his well-regarded book on *Sale and Purchase of Real Property in Malaysia*' that 'on the date of completion, and if the vendor becomes the bare trustee, it operates by conversions to the date when the contract was made'. The Supreme Court felt that it 'would cause considerable difficulties in the workings of the Torrens system of registration of title or even a modified Torrens system of land registration — as in Sabah — I

contained in a codifying enactment'. And, that problem would be compounded by the position of the purchaser under a judicial sale.

[35] On the facts in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd*, the Supreme Court overruled the High Court's decision on the existence of a bare trust; and further found that the charge created in favour of the finance company prevailed over that of the purchaser.

[36] The decision of the Supreme Court in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* was discussed at length by the Federal Court in *Tan Ong Ban v Teoh Kim Heng* decided just last year. The facts in *Tan Ong Ban* were these.

[37] Like the facts in our present appeal, the second defendant who is a licensed housing developer sold the same piece of property to two purchasers; the second of which had fully paid the purchase price and who had on-sold the same to the first defendant. The first SPA was in the statutory format prescribed under the Housing Development (Control and Licensing) Act 1966 and the first purchaser had yet to pay the purchase price. On obtaining vacant possession, the first defendant who was the second purchaser in the suit, started to renovate the property and that is when the plaintiff claimed that he chanced to pass by the property and saw the renovation works in progress. The plaintiff made a police report and then sued the two defendants.

[38] The first defendant claimed that he was a bona fide purchaser for value, that he was the beneficial owner of the property for valuable consideration. The second defendant went into liquidation and the insolvency department, decided not to defend the suit.

[39] One of the issues before the Federal Court was whether the principle of beneficial ownership or doctrine of bare trust established in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* applied equally to a statutory form of contract prescribed by the Housing Developers legislation. The argument being that because this was a statutory form of sale and purchase intended to protect house-buyers, the purchaser acquires beneficial ownership immediately upon entering the SPA even though the purchase price had yet to be paid in full.

[40] The first defendant in response had proffered the argument that the doctrine applied without distinction. A person who has paid in full but who has yet to be vested with the legal title stands in the same position as the legal owner in terms of enforcing proprietorship rights against the world at large. Under this principle, the vendor becomes the bare trustee for the purchaser, vis a vis the transacted property while the purchaser assumes the position of beneficial

owner having a right in rem over the property. The party who has not paid in full will of course, only have a right in personam and which is purely contractual in nature.

[41] The Federal Court agreed with the defence finding that the 'principle of beneficial ownership should apply equally to both negotiated contracts as well as statutorily formatted contracts'. The Federal Court did not find any 'valid reason to distinguish between the two transactions'.

[42] However, that does not mean that the first purchaser is without remedy. Until the title is registered under the National Land Code, the law of contract will apply. And, under the principles of contract, the purchaser will acquire a right ad rem and a right in personam immediately after the contract is entered — see *Bachan Singh v Mahinder Kaur & Ors* [1956] 1 MLJ 97.

[43] From the above decisions in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* as applied in *Tan Ong Ban*, it is obvious that these decisions are of no real relevance in these appeals as this court has found that the order of specific performance should and is ordered in respect of the first set of SPAs. The developer, Link Ventures has not appealed against the learned judge's findings that the first set of SPAs are valid. This position necessarily implies that Link Ventures, though still retaining beneficial ownership of the four units, was in no position to sell the same four properties to the third parties. The second set of SPAs with the third parties is consequently invalid. The third parties have not sought a refund of their monies in the event of such an eventuality, neither have the liquidators. We do not believe it is the function of the court to make such an order.

[44] We are therefore of the unanimous view that the order of specific performance be ordered against Link Ventures with the consequential order that the appellants pay to the liquidator the balance of the respective SPAs. The appeal by the appellants is therefore allowed while the appeal by the third parties is dismissed. We direct that each party is to bear its own costs.

Appellants appeal allowed.

Reported by Afiq Mohamad Noor